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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MARK S. STERN,

Plaintiff and Respondent,

v.

KENNETH M. STERN,

Defendant and Appellant.

B284405

(Los Angeles County
Super. Ct. No. BP151795)

APPEAL from a judgment of the Superior Court of Los Angeles County. Clifford L. Klein, Judge. Affirmed.

Kenneth M. Stern, in pro. per., for Defendant and Appellant.

Stern & Goldberg, Alan N. Goldberg and Peter Tran for Plaintiff and Respondent.

This appeal arises from a dispute between two brothers over their mother's estate. Mark Stern filed a petition in probate court, claiming that his mother, Thelma Stern, lacked testamentary capacity and was subjected to undue influence by his brother, Kenneth Stern, when she executed trust documents giving Kenneth the discretion to distribute the trust assets.¹ Kenneth defeated those claims.

On appeal, Kenneth argues that the probate court: (1) erred in ordering an accounting; (2) erred in its rulings on a handful of pretrial orders; and (3) should have awarded him costs. We find no error and affirm.

BACKGROUND

1. The Trust

Kenneth and Mark are the sons of Thelma and Henry Stern. A family trust (the Trust) created in 1984 provided that, upon the death of Henry and Thelma, the Trust assets would be distributed equally to Kenneth and Mark. Henry and Thelma were trustees.

Henry died in 2005. After Henry's death, Thelma modified the Trust to make both her and Kenneth trustees.

On August 16, 2011, Thelma signed handwritten instructions (the Instructions), giving Kenneth the authority to decide "how much of my property in trust and my other property not in trust will go to him and how much will go to Mark Stern."

¹ Because the parties and their deceased parents all share the same last name, we refer to them using their first names. No disrespect is intended.

In June 2012, Kenneth modified the Trust (the Third Modification), reducing Mark's share of the Trust assets to \$50,000. The Trust contained assets of about \$400,000. On August 15, 2013, Kenneth again modified the Trust (the Fourth Modification), reducing Mark's share to \$40,000.

Thelma died on January 6, 2014.

2. Proceedings in the Probate Court

On May 5, 2014, Mark filed a petition seeking to set aside the Third and Fourth Modifications on the grounds that Thelma lacked testamentary capacity and was under the undue influence of Kenneth at the time she executed the Instructions and when Kenneth created the Third and Fourth Modifications. Mark's petition alleged that Thelma suffered from dementia, including possible Alzheimer's disease, beginning in 2005. Mark claimed that Kenneth, an attorney, took advantage of his relationship of trust and confidence with Thelma to modify the Trust for his own benefit. Mark's petition also requested an accounting.

On March 29, 2016, Kenneth filed his own petition seeking, among other things, declaratory relief concerning whether Mark's alleged emotional abuse of Henry precluded Mark from taking any Trust assets, including the \$40,000 assigned to him under the Fourth Modification.

Trial on the two petitions took place in March 2017. Following trial, the probate court issued a final statement of decision dated June 9, 2017. The court found that: (1) Thelma had capacity to make a will and trust at the time she executed the Instructions; (2) the distribution of Thelma's estate in the Third and Fourth Modifications was "consistent with Thelma's stated desires and intentions"; (3) Mark failed to prove that Kenneth exercised undue influence or that Kenneth obtained an

undue benefit; and (4) the evidence “failed to support [Kenneth’s] allegations in his petition that Mark engaged in outrageous conduct and thus is precluded from any distributions from the [T]rust.” The court noted “that there was evidence that Thelma developed dementia and Alzheimer’s disease.” However, the court concluded that those “cognitive deficits vary in degree,” and found that Thelma was capable of making the “basic decision[]” about the allocation of her assets to her children. The court based its ruling primarily on video recordings of Thelma; the expert testimony of two psychiatrists; and the observations of two staff members of the facility in which Thelma lived.

The probate court also ordered Kenneth to provide Mark with an accounting of the Trust “from the date of Thelma’s passing, within 60 days of the final decision.” The court ordered that “[e]ach party shall bear their own costs.”

Following the statement of decision, Kenneth filed a motion seeking an award of costs based upon: (1) Mark’s denial of various requests for admissions concerning the issues of capacity and undue influence, on which Kenneth prevailed at trial; and (2) Mark’s rejection of an offer that Kenneth made prior to trial under Code of Civil Procedure section 998. The probate court denied the motion in a minute order dated July 27, 2017.

The probate court entered judgment on July 11, 2017.

DISCUSSION

1. The Probate Court Did Not Err in Ordering an Accounting

A decision whether to order an accounting where an accounting is permitted by law is committed to the probate court’s discretion, and we therefore review such a decision under the abuse of discretion standard. (*Esslinger v. Cummins* (2006))

144 Cal.App.4th 517, 526, 528–529 (*Esslinger*).) Whether the probate court had the legal authority to order an accounting is a question of law that we review de novo. (*Babbitt v. Superior Court* (2016) 246 Cal.App.4th 1135, 1144–1145 (*Babbitt*).)

Kenneth claims that the probate court did not have the authority to order an accounting because “[t]here is no beneficiary right to accounting for trusts created before 1987.” Kenneth cites Probate Code section 16062, subdivision (b) for that claim.²

Kenneth’s claim is wrong, because section 16062 is not the relevant section here. Section 16062 concerns a trustee’s mandatory, periodic duty to provide an accounting to beneficiaries. It creates a duty for a trustee to “account at least annually, at the termination of the trust, and upon a change of trustee, to each beneficiary to whom income or principal is required or authorized in the trustee’s discretion to be currently distributed.” (§ 16062, subd. (a).) While this specific duty does not apply to the “trustee of a living trust created by an instrument executed before July 1, 1987” (§ 16062, subd. (b)), other sections of the Probate Code are not so limited and provide the probate court with the discretion to order an accounting.

First, as the probate court here correctly observed, a probate court has the general authority “in its discretion” to “make any orders and take any other action necessary or proper to dispose of the matters presented by the petition.” (§ 17206.) That discretion includes ordering an accounting when the court

² Subsequent undesignated statutory references are to the Probate Code.

concludes that one is necessary to determine the status of trust assets. (*Christie v. Kimball* (2012) 202 Cal.App.4th 1407, 1413.) The probate court here reasonably found grounds for an accounting based upon “the hostile relationship between the parties.”

Second, sections 16061 and 17200 provide a beneficiary with the right to petition the court for an accounting when a trustee refuses to provide information about the trust. Subject to exceptions not relevant here, section 16061 requires a trustee “on reasonable request by a beneficiary” to provide information relating to the administration of a trust. Section 17200 permits a beneficiary to petition the court for an order compelling a trustee to provide information about the trust under section 16061 “if the trustee has failed to provide the requested information within 60 days after the beneficiary’s reasonable written request” and the beneficiary has not received the requested information in the prior six months. (§ 17200, subd. (b)(7)(B).)

Several cases confirm that these sections provide the probate court with the authority to order an accounting upon the petition of a beneficiary if the trustee has failed to honor the beneficiary’s request for information. In *Esslinger*, the court held that a remainder beneficiary had standing under section 17200, subdivision (b)(7) to petition the probate court for an order compelling the trustee to account. (*Esslinger, supra*, 144 Cal.App.4th at p. 520.) The court held that a beneficiary’s right to petition under section 17200 is not limited to enforcing the right to a periodic accounting under section 16062. The court acknowledged that a “remainder beneficiary does not have a right to an accounting under . . . section 16062.” (*Id.* at p. 526.) However, “section 16061 gives the remainder beneficiary the

right to request information from the trustee. If the trustee denies the request, then the remainder beneficiary may petition the probate court under . . . section 17200, subdivision (b)(7) to compel the trustee to provide the information or for a particular account.” (*Ibid.*) Similarly, in *Babbitt*, the court noted that section 17200, subdivision (b)(7)(B) “gives the probate court discretion to compel a trustee to provide ‘information about the trust’ to a remainder beneficiary where the beneficiary has sought such information under section 16061 and the trustee has failed to provide it within 60 days of the beneficiary’s reasonable request. This information may include an accounting, even though remainder beneficiaries are not entitled to such information under section 16062.” (*Babbitt, supra*, 246 Cal.App.4th at pp. 1141–1142, fn. omitted.)

Kenneth argues that Mark did not comply with section 17200 by providing a written request for information 60 days before filing his petition. However, section 17200 does not specify what type of written request must be made other than that the request must be “reasonable.” The probate court here noted that Mark included a request for an accounting in his petition. Mark filed his petition more than three years before the probate court’s final statement of decision granting the accounting. Kenneth did not provide an accounting during that time, and instead argued that he had no obligation to do so.

“The law neither does nor requires idle acts.” (Civ. Code, § 3532.) In light of Kenneth’s refusal to provide an accounting, a written demand separate from the petition would have been fruitless. On this record, we find no error in the probate court’s decision to consider the petition itself sufficient notice of Mark’s request for an accounting.

Kenneth claims that Mark's request for an accounting in his petition was contingent on a finding that Thelma did not have testamentary capacity. While the stated reason for the accounting request in the body of Mark's petition was that Thelma was not competent, the request was not contingent on such a finding. The petition's prayer for relief simply requested an order "[c]ompelling the Trustee to render a current accounting for all Trust activity, at least from August 16, 2011." Moreover, the probate court stated that its order for an accounting did not depend upon Thelma's capacity.

Finally, Kenneth argues that the accounting was moot once he paid Mark the \$40,000 that Mark was owed under the Fourth Modification. The record shows that Kenneth paid that sum during a posttrial hearing on July 10, 2017, after the probate court had already filed its final statement of decision ordering the accounting. The record of that hearing also shows that, even after payment of the \$40,000, a dispute remained between the parties concerning payment of interest on that money. (See § 12003.) The dispute persists, as shown by the parties' competing positions on the issue of interest in their appellate briefs. The probate court therefore did not abuse its discretion in ordering an accounting based upon the record at the time it ruled.

2. The Probate Court Did Not Err in Ordering the Parties to Each Bear Their Own Costs

Kenneth argues that the probate court should have awarded him costs because: (1) he was the prevailing party; (2) he made a settlement offer under Code of Civil Procedure section 998 that was just as favorable to Mark as the result of the trial; and (3) Mark failed to admit facts in responding to requests

for admission that Kenneth proved at trial. None of these arguments identifies any error.

A. *Prevailing party*

Both parties assume that Code of Civil Procedure section 1032 governs the probate court's costs award. However, the Probate Code contains a specific provision concerning costs. Probate Code section 1002 states that, unless otherwise provided "by this code or by rules adopted by the Judicial Council, either the superior court or the court on appeal may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require." Under Probate Code section 1000, the "rules of practice applicable to civil actions" apply to proceedings under the Probate Code "[e]xcept to the extent that [the Probate Code] provides applicable rules." Because Probate Code section 1002 establishes a specific rule governing costs, it appears to apply here rather than Code of Civil Procedure section 1032. (See *Hollaway v. Edwards* (1998) 68 Cal.App.4th 94, 99 ["although Code of Civil Procedure section 1032, subdivision (b) entitles a prevailing party in ordinary civil litigation to costs as a matter of right, the probate court retains discretion to decide not only *whether* costs should be paid, but also, if they are awarded, who will pay and who recover them"], citing Probate Code section 1002.)³

³ In any event, the difference between the statutes is immaterial here. Under either provision the probate court in this case had the discretion to decline to award costs. Although Code of Civil Procedure section 1032 provides that a "prevailing party" is entitled to his or her costs "as a matter of right," Kenneth does not meet the definition of a prevailing party under that section.

The probate court acted within its discretion in ordering the parties to bear their own costs. Kenneth prevailed in defending against most of Mark's claims. However, Mark prevailed in his request for an accounting, and Kenneth did not succeed on his own petition seeking to preclude Mark from receiving *any* money from the Trust. The trial court also noted that Kenneth "filed numerous voluminous, duplicative and meritless motions, virtually all of which were denied. The court will not award costs to Kenneth especially considering that Mark was forced to incur unnecessary costs responding to these motions. This court will not force Mark to subsidize Kenneth's litigious practice." The probate court did not abuse its discretion under these circumstances.

B. *Code of Civil Procedure section 998*

On March 5, 2015, Kenneth offered pursuant to Code of Civil Procedure section 998 "to allow a defense judgment to be taken against petitioner [Mark] in the amount of no money to petitioner." The offer expressly allowed for "the payment of the \$40,000.00 pursuant to the terms of the Fourth Modification (Amendment), dated August 15, 2013, of the involved family trust, which is by the terms of such amendment, payable, regardless of whether petitioner were to obtain a judgment, in his favor, in this case."

Because Mark obtained relief "other than monetary relief" (i.e., an accounting), the probate court could determine the prevailing party and, "in its discretion, . . . allow costs or not." (Code Civ. Proc., § 1032, subd. (a)(4).)

The trial court found that Kenneth was not entitled to a costs award based on this offer because: (1) Kenneth did not make the settlement offer in good faith; and (2) Mark obtained a better outcome at trial than Kenneth's offer. The record supports the second reason for the probate court's decision and we therefore need not consider the first.

Under Code of Civil Procedure section 998, a plaintiff must pay the defendant's costs from the date of the defendant's settlement offer if the plaintiff rejects the offer and "fails to obtain a more favorable judgment or award." (Code Civ. Proc., § 998, subd. (c)(1).) The probate court found that Mark "obtained a judgment that each party was to bear its own costs," which was more favorable than Kenneth's settlement offer, because acceptance of that offer would have exposed Mark to liability for Kenneth's costs.

That was a reasonable conclusion. In declining to award costs to either party after trial, the probate court specifically took into consideration that Mark prevailed on his request for an accounting. Had Mark accepted Kenneth's offer, he would not have obtained that relief. Rather, Kenneth would have been the unambiguous prevailing party and the probate court might well have decided that he was entitled to a costs award on that basis.

Moreover, Mark's success in obtaining an order for an accounting in itself was a more favorable outcome than Kenneth's offer. When a settlement offer "contains only a monetary offer but the relief recovered is both monetary and nonmonetary," a trial court must consider the offer "in light of the totality of the recovery." (*Arias v. Katella Townhouse Homeowners Assn., Inc.* (2005) 127 Cal.App.4th 847, 855–856.) Here, Kenneth's offer was that Mark take nothing on his petition, but Mark succeeded in

obtaining nonmonetary relief in the form of an accounting. The totality of the recovery shows that the outcome of the trial was more favorable to Mark than Kenneth's offer.

This finding is sufficient to support the probate court's decision that Kenneth was not entitled to costs under Code of Civil Procedure section 998. We therefore do not reach the issue of whether Kenneth's offer was in good faith.⁴

⁴ The trial court found that the offer was not in good faith because it was simply "tantamount to a request that Mark dismiss his claims for no benefit" and there was therefore no reasonable prospect that Mark would accept it. Mark cites authority for the proposition that "token" offers that do not place a defendant at any risk are not reasonable under Code of Civil Procedure section 998. In response, Kenneth cites this court's recent decision in *Licudine v. Cedars-Sinai Medical Center* (2019) 30 Cal.App.5th 918, which explained that whether a settlement offer has a reasonable prospect of acceptance should be evaluated in part by determining whether the offer was within the range of reasonably possible results at trial. (*Id.* at pp. 924–925.) Kenneth argues that the decision in *Licudine* controls here because his offer was within the range of reasonableness as shown by the probate court's ultimate decision. We note that the decision in *Licudine* did not consider a case such as this, where a defendant offers nothing more than a defense judgment as a mechanism to collect costs in the event that he or she prevails at trial. Nevertheless, we need not resolve this dispute because, as discussed, there is an adequate alternative ground to affirm the probate court's ruling.

C. *Mark's responses to Kenneth's requests for admissions*

Kenneth claims that he is entitled to his expenses in proving various facts that he requested Mark admit. Under Code of Civil Procedure section 2033.420, a party is entitled to his or her reasonable expenses in proving the truth of a matter that was the subject of a pretrial request for admission, subject to various exceptions. One of those exceptions is if “[t]he party failing to make the admission had reasonable ground to believe that the party would prevail on the matter.” (Code Civ. Proc., § 2033.420, subd. (b)(3).)

Kenneth claims that Mark unreasonably denied various requests for admission concerning Thelma's testamentary capacity and whether she was subject to undue influence. The probate court found that Mark had reasonable grounds to deny these requests. We review the probate court's finding for abuse of discretion. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1275–1276.)

The probate court did not abuse its discretion in concluding that Mark had reasonable grounds to believe that he would prevail on the identified matters. With respect to capacity, Kenneth requested that Mark admit: (1) he had “no knowledge of facts to support a claim that on August 16, 2011 [Thelma] lacked testamentary capacity”; (2) that “someone” who has dementia “does not preclude them from having testamentary capacity”; and (3) on August 16, 2011, Thelma's dementia “was not of such quality that it prevented her from having testamentary capacity.” With respect to undue influence, Kenneth requested that Mark admit he had no knowledge of facts to show that the Instructions were the result of Kenneth's undue influence. Thus, other than

his broad question about the general effect of dementia on capacity,⁵ Kenneth's requests asked Mark to admit ultimate facts in Kenneth's favor concerning Thelma's capacity and the lack of undue influence.

The probate court's findings are consistent with its conclusion that Mark reasonably believed he might prevail on these ultimate issues. In its order denying Kenneth's costs motion, the court noted that Mark "presented and relied upon circumstantial evidence of undue influence." The court cited its finding that "Kenneth admitted Thelma lacked capacity in other contexts." In its statement of decision, the probate court also identified the testimony of Mark's trial expert expressing doubts about Thelma's capacity. The court further noted that, in August 2011, "Thelma had some health problems which could arguably make her susceptible to undue influence," and found that two of the three factors necessary to create a presumption of undue influence were present.

The probate court was intimately familiar with the factual record and concluded that Mark had a reasonable belief that he

⁵ Kenneth's request that Mark admit that "someone" with dementia can nevertheless have testamentary capacity was both hopelessly vague and of questionable relevance. Mark could reasonably deny the request on the ground that, of all those persons with dementia, "someone" could have dementia serious enough to cause him or her to lack testamentary capacity. That is essentially what Mark did in stating in his interrogatory responses that "[d]ementia and/or Alzheimer's disease are indicia for determining whether someone has testamentary capacity and may preclude someone from being able to understand the nature and consequences of his or her actions."

could prevail at trial. That conclusion was consistent with the court's ultimate findings. The court therefore did not abuse its discretion in denying Kenneth costs based on his requests for admissions.

3. Kenneth Has Not Identified Any Error in the Probate Court's Award of Discovery Sanctions

Kenneth complains about sanctions awards against him for filing various discovery motions. Kenneth argues that the awards were not justified and/or that they were not sufficiently explained. We find no error.

Sanctions were awarded against Kenneth based upon unsuccessful motions to: (1) compel responses to written discovery without objection, where Mark had previously timely served objections (sanctions of \$700);⁶ (2) compel further responses to demands for production of documents and deposition testimony seeking Mark's personal financial information, which had been the subject of an earlier motion (sanctions of \$650); and (3) quash a subpoena seeking bank records, which the court found it had already ordered produced (sanctions of \$1,500).

Code of Civil Procedure section 2023.010 includes within the list of conduct subject to sanctions "[m]aking or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery." (Code Civ. Proc., § 2023.010,

⁶ Examples of some of Kenneth's interrogatories that were quoted in the papers on this motion shed light on the level of litigiousness underlying the discovery at issue. One of Kenneth's interrogatories directed Mark, "[f]or any time periods between 1974 through 2014 you hated your brother, Kenneth Stern, DESCRIBE YOUR HATRED for your brother, Kenneth Stern."

subd. (h).) Code of Civil Procedure section 2023.030 provides that “[i]f a monetary sanction is authorized by any provision of this title, the court *shall* impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.” (Code Civ. Proc., § 2023.030, subd. (a), italics added.) Thus, when a court “ ‘is forced to rule on . . . a motion to compel a further response to some form of discovery, the Discovery Act reflects the legislative determination that the one who loses that motion should presumptively pay a monetary sanction to the one who prevails.’ ” (*Mattco Forge, Inc. v. Arthur Young & Co.* (1990) 223 Cal.App.3d 1429, 1441, quoting 2 Hogan, *Modern Cal. Discovery* (4th ed. 1988) § 15.3, p. 301, italics omitted.)

We review the probate court’s sanctions awards for abuse of discretion. (*Doe v. United States Swimming, Inc.* (2011) 200 Cal.App.4th 1424, 1435 (*Doe*).) A trial court’s decision to impose a particular sanction is subject to reversal only for manifest abuse exceeding the bounds of reason. (*Ibid.*)

The probate court did not exceed the bounds of reason in its sanctions awards. The awards were modest in amount and were based on Kenneth’s conduct that the court reasonably found lacked substantial justification. Kenneth has not identified any abuse of discretion in the probate court’s rulings or the process it used to reach them.⁷

⁷ Kenneth incorrectly argues that the probate court erred in failing to make written findings supporting its sanctions award and in failing to review documents in camera. The court was not required to do either. Sanctions are presumptively warranted; a court must impose sanctions *unless* it makes

4. The Probate Court’s Denial of Summary Judgment Provides No Basis for Appeal

Except for Mark’s request for an accounting, Kenneth won at trial. He therefore cannot show any prejudice from the probate court’s decision to deny his motion for summary adjudication on the issues of capacity and undue influence, as he won on those issues at trial. (See *Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833 [“When the trial court commits error in ruling on matters relating to pleadings, procedures, or other preliminary matters, reversal can generally be predicated thereon only if the appellant can show resulting prejudice, and the probability of a more favorable outcome, *at trial*”].) Similarly, he cannot show any prejudice from the probate court’s denial of his motion on the issue of an accounting, as he lost at trial on that issue and, as discussed above, the probate court’s ruling was not erroneous. (*Ibid.*)

5. Kenneth’s Appeal Was Not Frivolous

Mark argues that Kenneth’s appeal was frivolous under *In re Marriage of Flaherty* (1982) 31 Cal.3d 637. Kenneth raised some arguable issues concerning the probate court’s orders on costs and an accounting. (See *id.* at pp. 650–651.) We therefore conclude that Kenneth’s appeal was not completely devoid of merit, and we reject Mark’s request for a finding that the appeal was frivolous.

findings that the losing party’s position was substantially justified. (Code Civ. Proc., § 2023.030, subd. (a).) And the court was not required to review documents in camera if Kenneth did not show good cause for doing so. (*Doe, supra*, 200 Cal.App.4th at p. 1436.)

DISPOSITION

The judgment is affirmed. Respondent Mark Stern is entitled to his costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.